

TEKITAL SDN BHD

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v.

SARINA KAMALUDIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR

B

NALLINI PATHMANATHAN J

[SUIT NO: D-22NCC-1019-2010]

27 AUGUST 2013

DAMAGES: *Measure of damages - Assessment - Decision of Deputy Registrar in awarding damages - Appeal against - Plaintiff entitled to be compensated by defendants for unlawful means of conspiracy - Pecuniary loss - Whether plaintiff entitled to 10% share of profits - Total loss of investment suffered by plaintiff - Tabulation of - Whether untenable for plaintiff to receive a return of the full extent of his investment and profits - Whether there were errors in award of damages given by Registrar*

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The defendants appealed against the decision of the Deputy Registrar in awarding damages to the plaintiff on the basis of the judgment of this court on liability ('the judgment of this court'). By virtue of the judgment of this court, damages were awarded on the basis that the plaintiff was entitled to be compensated by the foregoing defendants by reason of the defendants' participation in an unlawful conspiracy *ie*, by participating in the siphoning off of the business of an entity known as Auto Parking Inc Sdn Bhd ('API'). Briefly, the facts were that the plaintiff had entered into agreements related to the management of several car parks with API. Under the terms of the agreements, the plaintiff became entitled to receive a 10% share of the profits of API periodically. It was a further term of the agreements that in the event of any default in the payment of profits or the venture failing, API would, on demand from the plaintiff, repurchase the plaintiff's 10% shareholding. However, the plaintiff did not receive its share of profits as promised under these agreements save for an initial payment and after much demand. The present suit was therefore initiated against the six named defendants on the grounds that they had conspired with each other and acted in concert so as to deny the plaintiff its legitimate claim for an account of profits and a repurchase of its investments in API. As a consequence, the plaintiff suffered loss and damages as he was wrongfully deprived or denied of the profits emanating from the business of API. The plaintiff was also denied the ability to seek a re-purchase of its 10% shareholding in API.

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A Held (allowing appeal; setting aside decision of the Registrar):

- B** (1) The first head or measure of damages suffered by the plaintiff *ie*, pecuniary loss, is represented or measured directly by computing 10% of the profits enjoyed by the several businesses or assets that were transferred to the fourth, fifth and sixth defendants from API at the behest of the first, second and third defendants. If the management of these car parks had not been diverted or siphoned off from API, the plaintiff would have been entitled to a 10% share of the profits. Thus, there existed an unlawful conspiracy to injure. As such, the plaintiff was entitled to a 10% shareholding of the profits of these corporate entities. However, as the API was not a party to this suit, therefore no order could be made against API directly in this suit. As a consequence, the direct pecuniary losses which the plaintiff suffered as a consequence of API not paying out the 10% profits per year from 2005 to 2009 did not comprise the subject matter of this claim and may not be claimed here. Therefore, the Registrar erred in taking into account the profits of API. (paras 17 & 19)
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- E** (2) The plaintiff was only entitled to a payment of profits after these entities had complied with their relevant tax obligations in the normal course of business. Accordingly, the figure utilised by this court was 10% of each entity's profit after tax. As a consequence, the plaintiff was entitled to (i) a sum of RM56,814.96 by way of profit from D4 for the years from 2008 to 2012; (ii) a sum of RM43,225.60 by way of profit from D5 for the years from 2009 until 2012 and (iii) a sum of RM8,097.95 by way of profit from D6 for the years from 2009 until 2012. The total of the foregoing was RM108,138.51. (paras 22 & 24)
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- H** (3) The other heads of damages include the profits that the plaintiff was entitled to under the first agreement with API in relation to the management of the Selangor Turf Club whereby API was to share the profits on a 25%:75% ratio or pay the plaintiff a guaranteed minimum of RM180,000 per year and on demand, refund the RM210,000 initially invested by the plaintiff. As no monies were ever received by the plaintiff and the management of the STC Car Park was eventually diverted to D5, the plaintiff was entitled to damages under this head too. At a 25% share of profits, it followed from the defendant's tabulation of profits after tax that such percentage amounted to 25% of 432,256 = RM108,064. (para 25)
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- (4) The plaintiff was induced to invest in API over a period of time by promises and performance guarantees which never came into fruition. More gallingly however, the assets of the company he had invested in were wrongfully diverted so as to avoid having to meet those performance guarantees and to strip away assets such that the defendants could continue to enjoy the benefit of those assets while depriving the plaintiff of the same. The total loss of investment suffered by the plaintiff was RM1,584,000 (comprising 1.2 million + RM210,000 + RM174,000). The loss of profits was RM216,202.51. (para 29)
- (5) It was untenable of the plaintiff to expect to receive a return of the full extent of his investment as well as the profits as computed. This was particularly so given that he remained a 10% shareholder in API. However, the total quantum he expended by way of investment was a relevant factor to be considered when awarding or arriving at a suitable figure for general damages given the unlawful conspiracy to injure. Considering the entirety of the circumstances, it appeared to this court that a sum of RM792,000 which was equivalent to approximately 50% of the plaintiff's investment sum was a correct assessment of the quantum of damages payable by the defendants to the plaintiff. (paras 30 & 31)
- (6) This court had considered the learned Registrar's judgment. There were some errors in the award of damages as a consequence largely of the somewhat complex facts and findings of this court. Accordingly, the decision of the learned Registrar was set aside. The plaintiff was entitled to be awarded damages in the total sum of RM1,007,202.51 together with interest at the rate of 4% per annum from the date of judgment until full and final settlement. (para 32)

Case(s) referred to:

Lonrho PLC & Ors v. Fayed & Ors (No 5) [1993] 1 WLR 1489 (refd)

Quinn v. Leathem [1901] AC 495 (refd)

For the plaintiff - Ooi Huey Miin (Henry Ting with him); M/s HM Ooi & Assocs

For the defendants - DP Vijandran; M/s DP Vijandran & Assocs

Reported by Suhainah Wahiduddin

A JUDGMENT

Nallini Pathmanathan J:

B [1] The defendants in this matter seek to appeal against the decision of the learned Deputy Registrar dated 11 October 2012 awarding damages to the plaintiff on the basis of the judgment of this court on liability dated 20 January 2012 ('the judgment of this court').

C [2] By virtue of the judgment of this court, damages were awarded on the basis that the plaintiff was entitled to be compensated by the foregoing defendants by reason of these defendants' participation in an unlawful means conspiracy.

D [3] The unlawful means conspiracy here was the finding of this court that these defendants had participated in the siphoning off, of the business of an entity known as Auto Parking Inc Sdn Bhd (in liquidation) ('API'), before and soon after the winding up of API on 18 November 2009. The full details of this finding on liability are set out in the judgment of this court and I do not
E propose to reproduce the same here.

[4] The plaintiff entered into three agreements with API through Edison De' Cruz who at all times represented API:

F (i) *Vide* a 'shareholder's agreement' dated 25 August 2003 between API and the plaintiff, the plaintiff subscribed to a 25% equity between API and the plaintiff by payment a sum of RM210,000. Under the terms of this agreement there was a profit sharing ratio of 25% to the plaintiff and 75% to API. There was also provision for the repayment of the entire
G working capital of RM210,000 in the event of the shareholders' agreement or if API ceased to carry on business, on demand. This agreement related entirely to the Selangor Turf Club car park;

H (ii) The second agreement dated 5 January 2004 related to a car park known as the CSM car park. Under this agreement the plaintiff paid out a sum of RM174,000 to API and the profit ratio was to be shared on a 50% per cent basis each by the plaintiff and API; and
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- (iii) *Vide* the third agreement, the plaintiff here had contracted with one Edison De' Cruz to purchase some 250,000 shares in API for a sum of RM1.2 million in or around 2004 pursuant to an agreement dated 18 March 2004. API was at all material times involved in the car park business, in that it conducted the business of operating and managing car parks. The first part of the judgment of this court deals *in extenso* with the history of this matter. Suffice to say by way of summary that the plaintiff became a 10% shareholder in API. Under the terms of the agreement the plaintiff became entitled to receive a 10% share of the profits of API periodically. It was a further term of the agreement that in the event of any default in the payment of profits or the venture failing, API would, on demand from the plaintiff re-purchase the plaintiff's 10% shareholding. A
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- [5] The plaintiff did not receive its share of profits as promised under these agreements save for an initial payment and after much demand. D
- [6] The plaintiff instituted two suits, the first against API and the said Edison D'Cruz (made bankrupt as of 2009) in 2006 in D3-22-1492-2006. The plaintiff obtained judgment and damages equivalent to a sum of RM180,000 per annum for a term of five years against both parties. E
- [7] Another suit was instituted in S1-22-609-2006 against API where the plaintiff was compensated for damages for breach of the aforesaid agreement with API in the sum of RM1,084,131.50 together with interest up to and until the date of winding up of API in 2009. F
- [8] API (which it is to be noted is not a party to this suit) was wound up by a bank pursuant to a civil suit on 18 November 2009. The winding up petition had been presented in or around August 2009. In essence therefore the plaintiff received no compensation or monies as API was wound up and Edison De' Cruz made a bankrupt. G
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- [9] The present suit was therefore initiated against the six named defendants on the grounds that they had conspired with each other and acted in concert so as to deny the plaintiff its legitimate claim for an account of profits and a repurchase of its investment in API. I

- A** [10] It was concluded by way of liability that the defendants had unlawfully conspired to, and had stripped or siphoned off the assets of API such assets comprising the management of no less than 16 car parks (including the STC and CSM car parks) and its systems, transferring these ‘assets’ or ‘businesses’ to other
- B** corporate entities namely the fourth, fifth and sixth defendants, immediately prior to, or soon after API was wound up. Thereafter these entities particularly the fourth defendant continued to operate these 16 car parks which had been managed solely by API prior to its liquidation.
- C** [11] The net effect of this ‘stripping’ as it were, was to enable the first, second and third defendants to take control of all of API’s assets through their stable of companies or companies which they controlled namely the fourth, fifth and sixth defendants. The
- D** business of the insolvent API was therefore transferred to these defendants as a consequence of the unlawful conspiracy effected between the defendants. As a consequence the plaintiff, who had invested in API, suffered loss and damages as he was wrongfully deprived or denied of the profits emanating from the business of
- E** API, namely the management of 16 car parks. The plaintiff was also denied the ability to seek a re-purchase of its 10% shareholding in API, on demand.
- [12] The damages suffered by the plaintiff can therefore be summarised as follows:
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- (i) A tracing of the assets transferred to the third, fourth and fifth defendants (which is controlled by the first, second and third defendants) and a share of 10% of the profits of these businesses. This arises because the assets of API have been
- G** transferred (unlawfully) to these defendants. Therefore the profits which these defendants now enjoy which ought to have remained in the hands of API, is now traceable to them. The plaintiff is then entitled to a 10% share of those profits;
- H** (ii) In essence this amounts to a consideration of the profits of D4, D5 and D6 for the period from 2009 until 2013 and continuing (as the plaintiff continues to be a shareholder in API);
- I** (iii) The profit sharing ratio or proceeds for the Selangor Turf Club and CSM car parks; and

- (iv) General damages for the tort of unlawful conspiracy to injure - this would include an assessment of a quantum of monies sufficient to compensate the plaintiff for *inter alia*, the unlawful conduct of the defendants, the deprivation of the plaintiff's right to demand a re-purchase of its shares in API as contracted for, loss of opportunity to recover on the profit guarantees given by API. A B

[13] Having read and heard learned counsel for the plaintiff and the defendant it was agreed by the parties in principle that the foregoing represented the measure of damages which the plaintiff was entitled to. C

The Law

[14] As submitted by learned counsel for the plaintiff, the principles for the assessment of damages in cases of economic torts such as unlawful conspiracy has been set out in Clerk & Lindsell on *Torts* (19th edn) at para. 29-06: D

The general object of an award of damages is to compensate the claimant for the losses pecuniary and non-pecuniary, sustained as a result of the defendant's tort. The general principle is, in the oft-quoted words of Lord Blackburn, that the court should award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." E F

[15] And in *Lonrho PLC & Ors v. Fayed & Ors (No 5)* [1993] 1 WLR 1489 it was held at 1494B:

A plaintiff in a civil action for conspiracy must prove actual pecuniary loss, though if he proves actual pecuniary loss the damages are at large, in the sense that they are not limited to a precise calculation of the amount of the actual pecuniary loss actually proved. G

[16] In *Quinn v. Leathem* [1901] AC 495 it was said: H

... if the plaintiff gave proof of the actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account. I

A Pecuniary Loss

[17] This is the first head or measure of damages that the plaintiff suffered. This head is represented or measured directly by computing 10% of the profits enjoyed by several businesses or assets that were transferred to D4, D5 and D6 from API at the behest of D1, D2 and D3. If the management of these several car parks had not been diverted or siphoned off from API, the plaintiff would have been entitled to a 10% share of these profits.

[18] The defendants produced the audited accounts for:

(i) API;

(ii) D4 ie, Auto Parking (M) Sdn Bhd, to which the management of 14 car parks had been transferred;

(iii) D5 ie, Stess Services Sdn Bhd to which the STC Carpark Management had been transferred; and

(iv) D6, ie, Stess Property Sdn Bhd to which the management of the Plaza Putra Car Park had been transferred.

[19] Items (ii), (iii) and (iv) therefore reflect the assets or businesses that had been stripped or siphoned off from API and in respect of which the court found that there existed an unlawful conspiracy to injure. As such the plaintiff is entitled to a 10% shareholding of the profits of these corporate entities. It is important to note that the plaintiff is not entitled to make claim for a share of profits from API itself from 2005 onwards until date of liquidation or winding up, as this comprised the subject matter of the S1-22-609-2006. In other words the plaintiff has already received judgment for this sum up to and until 2009. More significantly, API is not a party to this suit. Therefore no order can be made against API directly in this suit. As a consequence the direct pecuniary losses which the plaintiff suffered as a consequence of API not paying out the 10% profits per year from 2005 to 2009, does not comprise the subject matter of this claim and may not be claimed here. The fact that the judgment makes mention of the failure of API to make payment to the plaintiff comprises a part of the background context leading up to the basis for the finding of unlawful conspiracy. To my mind therefore

the learned Registrar erred in taking into account the profits of API from 2005 onwards. This will not be taken into account in this appeal. **A**

[20] As such this assessment of damages will be restricted to a computation of the requisite profits from D4, D5 and D6 for the period from 2008-2009 onwards. This is because of the finding of this court was that there was an unlawful siphoning of the assets from API to D4, D5 and D6. To that end the profits of these other entities from that date therefore become relevant. **B**

[21] Based on disclosure from the defendants the audited accounts for D4, D5 and D6 were duly produced at the assessment before the learned Registrar. There is no real dispute as to the quantum of profits generated, save that learned counsel for the plaintiff urges this court, in computing the profits due to the plaintiff to take into account the profits of each of these entities before tax, while learned counsel for the defendant urges that the correct figure to be utilised is that of the profits of each entity after tax. **C**

[22] It appears to this court that the plaintiff would only become entitled to a payment of profits after these entities had complied with their relevant tax obligations in the normal course of business. Accordingly the figure utilised by this court is 10% of each entity's profit after tax. **D**

[23] To this end the audited accounts of D4, D5 and D6 are produced below: **E**

AUTO PARKING (M) SDN BHD
SUMMARY OF ACCOUNT

YEAR	DOCUMENT	TOTAL REVENUE	TOTAL EXPRESS	PROFIT	TAX	PROFIT AFTER TAX	10% OF NET PROFIT
2008	AUDITED	902,668.00	908,406.00	(5,738.00)	-	-	-
2009	AUDITED	522,945.00	489,214.00	33,731.00	537.00	33,194.00	3,319.40
2010	AUDITED	5,516,495.00	5,404,622.00	111,873.00	10,467.00	101,406.00	10,140.60
2011	AUDITED	5,229,578.00	4,972,795.00	256,783.00	47,071.00	209,712.00	20,971.20
2012	MANAGEMENT	5,615,543.38	5,317,093.21	298,450.17	74,612.54	223,837.63	22,383.76
TOTAL		17,787,229.38	17,092	695,099.17	132,687.54	568,149.63	56,814.96

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STESS SERVICES SDN BHD
SUMMARY OF ACCOUNT

YEAR	DOCUMENT	TOTAL REVENUE	TOTAL EXPRESS	PROFIT	TAX	PROFIT AFTER TAX	10% OF NET PROFIT
2009	AUDITED	593,806.00	543,351.00	50,455.00	-	50,455.00	5,045.50
2010	AUDITED	1,478,611.00	1,345,053.00	133,558.00	-	133,558.00	13,355.80
2011	MANAGEMENT	1,553,987.00	1,422,410.00	131,577.00	-	131,577.00	13,157.70
2012	MANAGEMENT	1,529,087.00	1,412,421.00	116,666.00	-	116,666.00	11,666.60
TOTAL		5,155,491.00	4,723,235.00	432,256.00	-	432,256.00	43,225.60

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STESS PROPERTY SDN BHD
SUMMARY OF ACCOUNT

YEAR	DOCUMENT	TOTAL REVENUE	TOTAL EXPRESS	PROFIT	TAX	PROFIT AFTER TAX	10% OF NET PROFIT
2009	AUDITED	79,441.00	3,217,916.49	(2,426,475.46)	-	-	-
2010	AUDITED	1,184,838.00	4,950,906.00	(3,766,068.00)	-	-	-
2011	MANAGEMENT	468,395.00	387,415.49	80,979.51	-	80,979.51	8,097.95
2012	MANAGEMENT	665,683.00	668,510.79	(2,827.79)	-	-	-
TOTAL		3,110,357.00	9,224,748.77	(6,114,391.77)	-	80,979.51	8,097.95

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[24] As a consequence the plaintiff is entitled to:

(i) A sum of RM56,814.96 by way of profit from D4 for the years from 2008 until 2012;

F (ii) A sum of RM43,225.60 by way of profit from D5 for the years from 2009 until 2012; and

(iii) A sum of RM8,097.95 by way of profit from D6 for the years from 2009 until 2012.

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The total of the foregoing is RM108,138.51.

[25] Apart from this the other heads of damages include the profits that the plaintiff was entitled to under the first agreement with API in relation to the management of the Selangor Turf Club whereby as stated above API was to share the profits on a 25%:75% ratio or pay the plaintiff a guaranteed minimum of RM180,000 per year and on demand refund the RM210,000 initially invested by the plaintiff. As no monies were ever received by the plaintiff and the management of the STC car park was

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eventually diverted to D5, ie, Stess Services Sdn Bhd, the plaintiff is entitled to damages under this head too. At a 25% share of profits it follows from the defendant's tabulation of profits after tax that such percentage amounts to 25% of 432,256 = RM108,064. The issue of a repurchase of the capital of RM210,000 on demand appears to be an item that is to be considered as a relevant factor under general damages, given that it is no longer feasible to expect the fulfilment of such an obligation, given API's insolvent status.

[26] The final head of pecuniary loss relates to the CSM car park whereby as stated at the outset it was agreed that the plaintiff and API were to share profits on a 50%:50% basis. The evidence however discloses that the CSM car park agreement was terminated in 2006. The management of this car park does not therefore appear to have been diverted to D4, D5 or D6 and accordingly no damages are recoverable under this head. The claim for the profit guarantee has already been awarded in the earlier civil suit.

General Damages

[27] In determining this issue this court will take into account:

- (i) The conduct of the defendants in relation to the conspiracy to injure;
- (ii) The fact that by reason of the conspiracy the plaintiff was deprived of the right to have the repurchase arrangements performed by API, which as an opportunity it has wholly lost;
- (iii) In this context the plaintiff made separate investments of RM210,000 to API in respect of the initial investment relating to the STC car park contract which it has lost; It made an investment of RM174,000 in relation to the CSM car park contract in respect of which it received no returns whatsoever; and invested RM1.2 million for a 10% shareholding in API with a buy back obligation, the performance of which is unenforceable by reason of API's insolvency as well as the diversion of all of API's assets to the various entities. Both the quantum of investment lost as well as the loss of opportunity to enforce the buy-back option are relevant factors to be considered in the award of general damages; and

- A (iv) Loss under the unperformed and ‘fictitious’ performance guarantees that induced the plaintiff to invest monies in API from time to time.

B [28] Learned counsel for the defendant has urged this court to consider that the foregoing arrangements and contracts entered into by the plaintiff were, after all, investments made by him which he cannot expect to bear complete fruition on the proposed terms. He points to the fact that this stable of companies from the time of API have been suffering losses and that this is simply an investment that did not work out. Learned counsel urges the court to take these factors into consideration as well as the fact that there was no evidence of fraud in this case.

C [29] Having considered the findings in the judgment it appears to this court that the plaintiff was induced to invest in API over a period of time by promises and performance guarantees which never came to fruition. More gallingly however, the assets of the company he had invested in were wrongfully diverted so as to avoid having to meet those performance guarantees and to strip away assets such that the defendants could continue to enjoy the benefit of those assets while depriving the plaintiff of the same. The total loss of investment suffered by the plaintiff is RM1,584,000 (comprising RM1.2 million + RM210,000 + RM174,000). The loss of profits is RM216,202.51 (see above from the tables).

D [30] It is untenable of the plaintiff to expect to receive a return of the full extent of his investment as well as the profits as computed above. This is particularly so given that he remains a 10% shareholder in API. However the total quantum he expended by way of investment is a relevant factor to be considered when awarding or arriving at a suitable figure for general damages given the unlawful conspiracy to injure.

E [31] Considering the entirety of the circumstances it appears to this court that a sum of RM792,000 which is equivalent to approximately 50% of the plaintiff’s investment sum is a correct assessment of the quantum of damages payable by the defendants to the plaintiff. When added together with the loss of profits the plaintiff is entitled to a sum of RM1,007,202.51. The plaintiff is also entitled to interest at the rate of 4% from the date of judgment until full and final settlement.

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[32] I have considered the learned Registrar's judgment. It appears to this court that there were some errors in the award of damages as a consequence largely of the somewhat complex facts and findings of this court. Accordingly the decision of the learned Registrar is set aside and the appeal is allowed. The plaintiff is entitled to be awarded damages in the total sum of RM1,007,202.51 together with interest at the rate of 4% per annum from the date of judgment until full and final settlement.

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